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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 276.

ANDREW WEST,

APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY,

APPELLEES.

BRIEF FOR APPELLEES

CHARLES W. BUNN,
CHARLES DONNELLY,
JAMES B. KERR,
STILES W. BURR,
Counsel for Appellees.

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STATEMENT.

Within the place limits of the grant of lands to the Northern Pacific Railroad Company (13 Stat. 365) were included certain lands now forming part of the Mt. Ranier National Park; and when, on March 2, 1899, Congress passed the act creating that park (30 Stat. 993) it was deemed necessary to obtain a relinquishment of title thus granted. Accordingly, by sections three and four it was provided:

"Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

"Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the perioid of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely con-

> form with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

The proposition thus made was accepted, and the Northern Pacific Rail*road* Company, the Northern Pacific Rail*way* Company and the Central Trust Company of New York executed and filed with the Secretary of the Interior a deed releasing and conveying to the United States all claim to lands within the park thus created. (Tr. 68.) This relinquishment was finally approved and accepted by the Secretary of the Interior on July 26, 1899, in an order or decision which, after reciting the relinquishment and its acceptance, proceeds to declare:

> "The Northern Pacific Rail*way* Company, successor to the Northern Pacific Rail*road* Company, is therefore entitled, in accordance with the provisions of Section 3 of said Act * * * to select an equal quantity of non-mineral public lands * * * to the extent of the land so relinquished."
>
> See Ferguson v. Northern Pacific Railway Co., 33 L. D. 634, 636.

June 21, 1901, the Northern Pacific Railway Company filed in the United States Land Office at Coeur d'Alene, Idaho, its selection list No. 61, by which, proceeding under section four quoted above, it selected, in lieu of lands released to the United States, certain unsurveyed lands, describing them as "*tracts of land, which, when surveyed, will be described as follows.*" There follows a description by section, township and range of the tracts selected, among them being section 20, township 44 north, range 3 east. (Tr. 49-54.)

May 15, 1903, the appellant went upon the southeast quarter of section 20, township 44 north, range 3 east, and

except for occasional intermissions, resided upon it thereafter. (Tr. 28.) At that time this township was still unsurveyed, but the south line of the adjacent township, 45 north, range 3 east, had been surveyed some two years before. (Tr. 34, 82; Appellant's Brief, p. 2.) Township 44, range 3, was surveyed in the field in the first week of July, 1903, some six weeks after appellant first went upon the land. (Tr. 31.)

July 17, 1905, the official plat of survey of township 44 north, range 3 east, was filed in the land office at Coeur d'Alene, and on that day appellant tendered his application to enter, under the homestead law, the southeast quarter of Section 20, township 44 north, range 3 east. His application was rejected on the ground that the land had been selected by the Northern Pacific Railway Company. (Tr. 3, 12, 40, 41.)

July 31, 1905, the Northern Pacific Railway Company filed in the local land office a new selection list, describing the land in question according to the survey. (Tr. 54-57.) October 13, 1910, patent was issued to the Railway Company. (Tr. 67-70.)

In this suit appellant asks a decree declaring that he is the owner of the land which he sought to enter, and that the Railway Company and its grantee, the Timber Company, hold their title to it in trust for him. The lower court found against him and ordered his bill dismissed. (Tr. 71-87, 210 Fed. 189.) The Circuit Court of Appeals affirmed the decree unanimously. (Tr. 102-113, 221 Fed. 30.)

The issues presented by this appeal are stated by counsel for appellant (Brief p. 14) to be the three following:

"1st. The grant having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land, a part of which was to be reconveyed, could a selection be made by the Northern Pacific *Railway* Company, a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property and franchises of the *Railroad* Company under foreclosure sale, it was its successor in interest?

2nd. The lands having been classified under the Act of February 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the company under the Act of Mar. 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *a reasonable degree of certainty,* so as to bar the rights of settlers in good faith without actual or constructive notice?"

We shall discuss these three questions in the order in which they are stated.

ARGUMENT.

I.

Section 3 of the act of March 2, 1899, provides, as the court will have observed, "that upon execution and filing with the Secretary of the Interior by the Northern Pacific Rail*road* Company of proper deed, etc., * * * said company is hereby authorized to select, etc." When this act was passed, the Northern Pacific Rail*way* Company had succeeded to all of the property of the Northern Pacific Rail*road* Company, including the land of which the government was seeking to obtain title and for which it was proposing by that act to exchange other lands. Accordingly, the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company all joined in releasing to the United States the lands lying within the park area (Tr. 68); and the Northern Pacific Railway Company, having filed with the Secretary of the Interior evidence that it was the lawful successor of the Northern Pacific Railroad Company, (Tr. 69) was allowed to select and has ever since been allowed to select the lands given in exchange for the lands relinquished.

Before the trial court, appellant contended that because the "grant" was to the Northern Pacific Rail*road* Company, the Northern Pacific Railway Company was not qualified to select the land and that there was no evidence that the latter company was the successor of the former. That this court may have a clear apprehension of the point there made, we quote from the record (Tr. 75-78) exactly what the trial court said regarding it:

"The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, it was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the Railway Company was 'the lawful successor in interest' of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to pass upon questions of succession, and insofar as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle already adverted to, it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the Railway Company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is, however, argued that as a matter of law it would be held that the Railway Company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad Company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the Railroad Company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the Railroad Company by the act of July 2, 1864, (13 Stat. 365). For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange.

The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately-owned lands, to carry out its own purposes, and in securing title thereto, surely it was not greatly concerned in the question to whom the consideration should be paid or what was done with it after it was paid. In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the Railroad Company rather than the Railway Company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the Railway Company had succeeded to the property rights and franchises of the Railroad Company, for but a short time prior thereto, by a proviso in the act of July 1, 1898, (30 Stat. 621; 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than of legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the Railway Company acquired all the property rights and franchises of the Railroad Company. 21 *Ops. Atty. Gen.* 486; 25 *Ops. Atty. Gen.* 401; *Ferguson v. Northern Pacific*, 33 L. D. 634. See also *Northern Pacific Ry. Co. v. United States*, 176 Fed. 706 *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; 35 Sup. Ct. Rep. 554. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed, the Railroad Company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Com-

pany, and unless we hold either that by inadvertence the Rail*road* Company was named while the Rail*way* Company was intended, or that the privilege conferred upon the Railroad Company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M. K. & T. Ry. Co. v. Kansas, Pacific Ry. Co.*, 97 U. S. 497. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster v. Luther*, 163 U. S. 331. *Beley v. Naphtaly*, 169 U. S. 353. Accordingly it is held that the Railway Company could, as a matter of law, by assignment become the successor in interest of the Railroad Company to the rights and privileges conferred by the act of 1899, and it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention."

On taking his case to the Circuit Court of Appeals, the appellant, by his assignment of errors, preserved this point (Tr. 89), charging in the third assignment that "the court erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which was expressly named in the grant". On presenting his case in that court, however, he abandoned the contention altogether. The "single question" urged by him in that court was the question of the sufficiency of the description in the Railway Company's selection. (Tr. 112.)

On removing the case to this court, appellant, by his assignment of errors, still preserved this point; and although, as stated, he had abandoned it on his presentation of the case to the Court of Appeals, he charges that

court in assignment 1½ (Tr. 116) with having "erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company." But on coming to brief the point, he shifts his ground. He quotes from the opinion of the trial court some of the language which we have quoted above; avers that that court "*evidently misunderstood* the point involved" (Brief, p. 16); asserts that the real question is "whether the new grant of 1899 to that company, *which then had no existence*, could be taken by the Railway Company as a substituted grantee;" and then, without the slightest regard to the limitations of the record, proceeds to argue in support of the entirely new proposition "that at the date of the act of March 2, 1899, the Northern Pacific Railroad Company, chartered by Act of Congress in 1864, had no existence and hence there was no grantee to take and the grant is *therefore* absolutely void." (Brief p. 20.) The question thus stated becomes a question, not of successorship, but of the validity of the "grant" and whether it did not fail altogether for want of a "grantee."

But this question is not in the case. No such question was suggested to either of the courts below; nor is there a word in the evidence or in the assignments of error which affords any basis for its suggestion here. For evidence of the fact that in 1875 there was a foreclosure of the mortgage given by the Northern Pacific Railroad Company, counsel for appellant do not refer to the record. They refer to "Smalley's History of the Northern Pacific Railway Co." (Brief, p. 18.) If we are to assume that they mean to refer to the "History of the Northern Pacific Railroad," by Eugene V. Smalley, published by G. P.

Putnam's Sons in 1883, then we say, first, that this is not an authoritative publication which the court will notice judicially for the purpose of getting information of what took place in a foreclosure proceeding; and, second, that the slightest examination of the book itself and of the proceedings through which the Northern Pacific Railway Company got its title, shows counsel's account of the facts and of the effect of those proceedings to be grossly inaccurate. Authentic evidence of what was done in a foreclosure suit can be obtained only from the record of the suit. This court had occasion in *Northern Pacific Railway Company v. Boyd,* 228 U. S. 482, to consider, upon an adequate record, the steps by which the Railway Company acquired its title; and it has given a full account of them in the report of that case. If counsel were unwilling to examine the records in the foreclosure suits to ascertain what was done, they might have learned from an examination of the report in the *Boyd* case (p. 491) that the Northern Pacific Railroad Company was *not* divested of all of its property in 1896; that it continued to exist and to own the granted lands east of the Missouri River until months after the act of March 2, 1899, was passed ;and that it was its existence as late as 1912 which gave to this court jurisdiction of that case.

Moreover the argument that there was a failure of the "grant" for want of a "grantee", like most of what is said in the brief, assumes that the act of March 2, 1899, was an ordinary grant of lands to a railroad company; but it was not. It was primarily an offer to exchange lands. The government desired to embrace within the limits of a national park certain lands within the limits of the grant of 1864 to the Northern Pacific Railroad Company. That

grant had been fully earned and the title was certainly outstanding *somewhere*. Supposing it to be in the Northern Pacific Railroad Company, the government, by the act of March 2, 1899, made an offer, which might be accepted or rejected, to exchange other lands for the lands granted in 1864. The same offer was made by the same act to settlers within the park limits.* The following language quoted by the trial court (Tr. 85-86) from the decision of Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 138, undoubtedly gives to the act the right construction:

> "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer."

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* Though it is not a matter of consequence, it should be noted that counsel persistently misrepresent the effect of the act of March 2, 1899, as regards the right which it gave to settlers. They say (Brief p. 10) that "while the Railroad Company is given the right to select from the surveyed and **unsurveyed** public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted in lieu of his right, the right to select **only** surveyed lands." They repeat the statement at p. 59. The statement is utterly untrue. The settler is given the same right to select unsurveyed lands that is possessed by the Railway Company. The act provides specifically that "any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof **to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.**" The conditions "provided by law for forest reserves" are those named in the Act of June 4, 1897, (30 Stat. 11, 36); and that act allowed the selection by the settler of land either surveyed or unsurveyed. **F. A. Hyde**, 28 L. D. 284.

Of the offer thus made an acceptance was filed by what was certainly the Northern Pacific Railroad Company *de facto,* by its successor the Northern Pacific Railway Company, and by the trustee in the Railway Company's mortgage; and these three companies joined in a deed of reconveyance to the United States. No one denies that the effect of this deed was to give to the United States something which it did not possess before, namely, title to the lands within the park limits granted by the act of 1864. The government itself is satisfied with its title; and certainly it cannot, while retaining that title, deny to those from whom it was obtained the lands offered in exchange.

The fallacy of appellant's position and the intolerable consequences which would result from the rule for which he argues are forcibly and concisely explained in a recent decision of the Secretary of the Interior. *Delany v. Northern Pacific Railway Company,* 45 L. D. 6.

Finally, even if the evidence and the assignments of error afforded a basis for presenting this contention, the failure to present it to the court below (Tr. 112) deprives appellant of his right to present it here. This court will consider only whether the Circuit Court of Appeals erred; and certainly it will not reverse that court's decree on a question which it was never asked to consider. *Montana Railway Company v. Warren,* 137 U. S. 348, 351.

II.

After the decision of this court in *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288, and probably because of a suggestion contained in that decision, Congress passed the act of February 26, 1895 (28 Stat. 683), providing for the examination and classification of lands within the limits of the grant of 1864 to the Northern Pacific Railroad Company. Pursuant to that act the Secretary of the Interior, on June 25, 1895, issued instructions to the Board of Land Commissioners appointed under it to "examine, for the purpose of classification, *odd-numbered* sections within the grant *only*." (Tr. 64, 67; 20 L. D. 571; *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 136; *Northern Pacific Railway Company v. State of Idaho*, 37 L. D. 68, 69). Appellant asserts that notwithstanding these instructions, the Board of Land Commissioners classified the land involved in this case as mineral land, and that this classification received departmental approval. We shall demonstrate that the record does not support this contention. And if it were true that the land in suit had been so classified under the act of 1895, it is nevertheless true that it is in fact non-mineral. Everyone concedes this (Tr. 78); appellant insists on it (Tr. 40); indeed, his case depends upon it, for his rights rest on the homestead law and under that law he could take title only to non-mineral lands. But he now asserts that though the land is non-mineral in fact, and though its classification as mineral was erroneous, and though the action of the Commissioners in making any classification

of it was opposed to departmental instructions; nevertheless that classification is final under the act of February 26, 1895; and as the Mt. Ranier act allows the selection only of non-mineral land, the Department's action in awarding it to the Railway Company was unauthorized. There are several sufficient answers to this contention.

1. No such contention was made in either of the courts below. In the District Court appellant's position was that the land had not been classified at all, and that it was not subject to selection by the Railway Company because not affirmatively classified as non-mineral at the time of survey. Referring to appellant's contention in this regard, the District Judge said (Tr. 78):

> "Precisely stated, it is that the land was not expressly classified as non-mineral by the surveyors in the field; *it is not claimed that it was returned as mineral*, nor is there now any question that it was in fact non-mineral."

The only assignment of error presented to the Court of Appeals which in any way touches the point is as follows (Tr. 88, 89):

> "The court erred in holding and deciding that the real estate in controversy *had been classified as land non-mineral in character* as provided in the act of March 2, 1899, under which the defendants claimed."

Manifestly that assignment of error does not raise or remotely suggest the proposition now argued. Moreover, that assignment was definitely abandoned by appellant in the Court of Appeals. It was not mentioned or touched upon in any manner whatsoever in his brief; and at the oral argument, appellant's counsel expressly disclaimed reliance on the point, stating frankly that he believed the

record did not present the question. As we have already pointed out, and as the Court of Appeals states in its opinion (Tr. 112), the "single question" presented to that court was the question of the sufficiency of the description.

What is said above of the waiver of the successorship point by failure to present it to the court below, applies with still greater force to this classification point; especially in the form in which it is now urged. The proposition that the land in suit was affirmatively classified as mineral under the act of 1895 is not only a mere afterthought, which was not suggested in either of the courts below, but it is directly inconsistent with the position taken by appellant at the trial, where he claimed that the land had not been classified at all.

2. The land in suit is part of an even-numbered section. The act of February 26, 1895, was designed to secure classification only of the lands which the Railroad Company might claim. By the terms of its granting acts the Railroad Company was limited to land in odd-numbered sections. The acts of June 4, 1897, July 1, 1898, and March 2, 1899, under which the Railroad Company might acquire land in even-numbered sections had not yet been passed. Had Congress been providing for a general examination and classification of lands in Montana and Idaho, whether or not the Railroad Company might claim them under its grant, it would hardly have restricted the activities of the examiners to the land grant limits. The Department was undoubtedly right in its instructions limiting the *classification* to the odd-numbered sections, although permitting the *examina-*

tion of adjacent sections for geological conditions which might influence the classification of the odd sections. The act of 1895 expressly provides that the Department shall make rules and regulations governing the action of the Commissioners. The regulations referred to involve a construction of the act. And the construction so adopted has steadfastly been adhered to by the Department for more than twenty years.

Instructions, 20 L. D. 571.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135.

Northern Pacific Railway Co. v. State of Idaho, 37 L. D. 68.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 70.

Regulations, 44 L. D. 285, 297.

This brings the case within the familiar rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon it in contemporary administration, by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been continuously recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.

Logan v. Davis, 233 U. S. 613, 627.

United States v. Hammers, 221 U. S. 220, 228.

Louisiana v. Garfield, 211 U. S. 70, 76.

Hewitt v. Schultz, 180 U. S. 139, 156, 163.

United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Heath v. Wallace, 138 U. S. 573, 582.
United States v. Moore, 95 U. S. 760, 763.

3. If appellant's contention that the act of 1895 authorizes the classification of even as well as odd-numbered sections—or that a classification by the Commissioners of even sections, although unauthorized, is final and conclusive—is sound, it is fatal to his own case.

If the classification of an even section as mineral is final, it must be final as to everyone. No other conclusion is consistent with the theory that Congress intended, by the act of 1895, to authorize the classification of even sections. It is absurd to suppose that Congress intended to provide for an expensive examination and classification of even sections, which should be effective only against the Railroad Company, when the Railroad Company's grant was limited to odd sections. Therefore, if it can be held that the classification of even sections is authorized by the act of 1895, and is final or conclusive for any purpose, there is no escape from the conclusion that such classification is final and conclusive as to every one, and not as to the Railroad Company alone.

The law under which appellant claims gives him no right to the land unless it is nonmineral. And if the land was classified as mineral, as appellant asserts, and such classification is final as against the Railroad Company, it is likewise final against appellant, establishing the character of the land as against his claim. In a suit like this, plaintiff cannot prevail upon a showing of error in the

award of the land to a patentee. He must also show, as the foundation of his case, that he is himself entitled to the land as against the Government. See authorities cited in paragraph 6 below. So if appellant's contention as to the classification of the land is sound, it cuts the ground from under his own feet and deprives him of the equity upon which his case depends.

4. We have proceeded thus far under the implied concession that it appears, as appellant asserts, that the land in suit was in fact classified as mineral under the act of 1895. But such is not the case.

The sole support for appellant's contention is a recital in an opinion by the Commissioner of the General Land Office (Tr. 62-66) which deals with a large quantity of lands and a number of individual claims, including that of appellant. Some of these lands were in odd-numbered sections, which admittedly were classified as mineral under the act of 1895. Other lands, like that in suit, were in even-numbered sections. The recital in question does not specifically refer to the land claimed by appellant; and we submit that it is neither definite nor conclusive. The decision was not a final decision under the practice of the Department. It was in fact appealed from, and the decision of the Secretary on appeal, which was duly put in evidence at the trial (Tr. 67) is found at 37 L. D. 135. In that decision, the Secretary says:

> "The *odd-numbered sections* were classified as mineral under the act of February 26, 1895. * * * The returns made at the time of actual government survey classify the same tracts as non-mineral. * * * Said list number 61 covers parts of even-numbered

> sections only, while a portion of the tracts described in lists number 63 and 65 are also parts of even-numbered sections. As such sections were not subject to classification under the act of February 26, 1895, supra, the first objection of the State cannot be considered as applying to those tracts."

And there is nothing in the Secretary's decision from which it can be inferred that Section 20 was ever classified as mineral.

The full record of the proceedings in the Department was not put in evidence. Such record of those proceedings as was introduced at the trial was obviously fragmentary and incomplete. There is a familiar and well settled rule (to which we shall refer more particularly hereafter) that a patent for land amounts to an adjudication of all facts essential to sustain the right of the patentee to the land; that where the patent title is questioned in a suit of this chraacter, the burden is upon the party attacking it to controvert by competent and conclusive evidence every theory of fact upon which the patent might be sustained; and that no inferences or presumptions adverse to the patent title will be indulged in. Under this rule and upon such a record it will be presumed, if necessary to sustain the patent, that if all the proceedings in the Department were before the court it would be found either that Section 20 was not classified under the act of 1895, or that the unauthorized classification of this even-numbered section had been corrected and set aside.

Be that as it may, the recital on which appellant relies, when considered in connection with the decision of the Secretary on appeal, and in the light of the rule referred to, is equivocal at best; and in view of the incomplete state

of the record, and of the evidence and admission about to be mentioned, it is quite without probative force.

Appellant called as a witness the Register of the United States Land Office at Coeur d'Alene, in whose district the land in suit is situated, and examined him on the question whether that land had been classified as mineral or non-mineral. Testifying from the records of his office, the Register declared that Section 20 had *not* been classified under the act of 1895—that the odd-numbered sections in that township had been classified as mineral under that act, but that the even-numbered sections had not. It may be said that the evidence thus elicited related to the records of the Coeur d'Alene Land Office only. But the act of 1895 expressly requires (Section 6) that "all plats and records of the *local* and general *land offices* shall be made to conform to such classification." Under the rule of law above referred to, the court is not permitted to indulge in the presumption that the officers of the Department failed in the duty imposed upon them by the express terms of the act of 1895, to cause the classification of lands thereunder to be entered on the records of the local land office; nor in the face of the showing that those records disclose that the section here involved was not so classified, although odd-numbered sections in the same township were, to presume that a classification had in fact been made. See *Lynch v. United States* (C. C. A. 9th Circuit), 138 Federal 535, 542-543, where these provisions of the act of 1895 were under consideration.

And while the witness was under cross-examination, appellant's counsel made the following deliberate admission: "*We admit now that the records do not show that there was a classification of Section* 20." (Tr. 37.)

We therefore submit that it cannot be held upon this record, even if the point were open to appellant, that the land in suit was ever classified as mineral under the act of 1895. So that even if the proposition upon which appellant relies were sound in law, it is not involved in the present case.

5. But if it be conceded that the act of 1895 authorized the classification of even-numbered sections, that the land in suit was duly classified as mineral under that act, and that the question is open to appellant in this court, nevertheless appellant's argument is without avail.

The Department has uniformly held that a mineral classification under the act of 1895, even of an odd-numbered section within the grant limits, is not an obstacle to its subsequent selection under the act of March 2, 1899. The question was first presented nearly ten years ago, and the rule then announced has since been consistently followed and applied.

State of Idaho v. Northern Pacific Railway Co., 37 L. D. 135.

Northern Pacific Railway Co. v. State of Idaho, 37 L. D. 68.

Adnah M. Kimpton, 45 L. D. 110.

Miles v. Northern Pacific Railway Co., (Opinion on denial of rehearing by Secretary, February 16, 1915. Printed as an appendix to this brief.)

And the ruling of the Department was right. No other conclusion could properly have been reached in view of the provisions of the act of March 2, 1899. That act was

passed four years after the act of February 26, 1895. It was passed for a special purpose—the acquisition by the Government of lands in the Mount Ranier National Park to which the Northern Pacific Railway Company had a vested title. As consideration for the relinquishment of those lands, the act conferred upon the Northern Pacific the right to select other lands, within or without the limits of its original grant. And that right of selection was, by the express terms of the act, extended to "non-mineral public lands, so classified as non-mineral *at the time of actual government survey, which has been or shall be made.*" This language plainly excludes the idea that the right of selection thus granted can be made to depend upon a classification of such lands under a prior special act, where the land selected is admittedly non-mineral in fact, and was duly classified as non-mineral "at the time of actual government survey" as provided in the act of 1899.

6. In the District Court, appellant argued that it did not appear that the land in suit was affirmatively "classified as non-mineral at the time of actual government survey" as required by the act of March 2, 1899, and this point only was covered by his assignments of error to the Court of Appeals. But, as we have indicated, that assignment of error was definitely abandoned by appellant in the Court of Appeals; and the court below was not asked to pass, and did not pass, upon the question. And we submit that, for the reasons stated in paragraph 1 of this subdivision of our brief, the question is not open on the present appeal. Indeed, appellant does not appear to rely upon it here, although he refers to it in an indirect and

half-hearted way. But the question may readily be disposed of on the merits.

First let us refer to certain principles of law, firmly established by numerous decisions of this court, which should be regarded in the consideration of this question. These principles may be stated as follows: A patent for land is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of public lands are confided, that the patentee is entitled to the land. Where, as here, the land covered by the patent is land which was within the jurisdiction of the Departmnt, the patent is impervious to collateral attack. It cannot be questioned in any form of action at law, but only by suit in equity by the Government to set aside the patent, or by an individual claimant to have the patentee declared trustee of the legal title for his benefit. In such a suit the patent is conclusive upon all questions of *fact*, or *mixed law and fact*, actually decided by the Department or necessarily involved or implied in the determination that the patentee is entitled to the land. Where the suit is by an individual claimant, it is essential for him to show that he is himself entitled to the land as against the Government; so that under the law, rightly administered, a patent would be issued to him. Where the patent title is questioned in a suit of this character, the burden is upon the party attacking it to controvert, by competent and conclusive evidence, every theory of fact upon which the patent might be sustained. No inferences or presumptions will be indulged adverse to the patent title. There must be a clear and unequivocal showing of superior right in the plaintiff; and this conclusion cannot be made to depend upon inferences, or

upon evidence susceptible of a construction which would sustain a judgment for the patentee. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown save by a clear, conclusive and unequivocal showing of the non-existence of such facts, or of the existence of facts creating a superior right in the plaintiff; and in either case the burden is upon the plaintiff and must be sustained by him at all points. And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained and the patent will control.

Smelting Co. v. Kemp, 104 U. S. 636, 640, 647.
Maxwell Land Grant Case, 121 U. S. 325, 379, 381.
Lee v. Johnson, 116 U. S. 48, 50.
Steel v. Smelting Co., 106 U. S. 447, 450-454.
Bohall v. Dilla, 114 U. S. 47, 51.
Sparks v. Pierce, 115 U. S. 408, 413.
Marquez v. Frisbie, 101 U. S. 473, 475.
Quinby v. Conlan, 104 U. S. 420, 425.
Whitcomb v. White, 214 U. S. 15.
Ross v. Day, 232 U. S. 110, 116.
Ross v. Stewart, 227 U. S. 530, 535.
Johnson v. Riddle, 240 U. S. 467, 474.
Leonard v. Lennox, (C. C. A. 8th Cir.), 181 Fed. 760, 762; Opinion by Mr. Justice Van Devanter.

Now, the patent under which appellees hold, amounts to an adjudication, among other things, that the land selected was of the character subject to selection under the act of 1899; that is, that it is non-mineral land, duly classified

as non-mineral within the intent of the statute. Upon the record in this case, it must be held that this determination involves a question of fact, or at most of mixed law and fact, upon which the action of the Department is final and conclusive.

7. It seems to be appellant's theory that it has been made to appear that the surveyor's return with respect to the character of the land was not sufficiently definite to amount to the affirmative non-mineral classification which he asserts was essential. But the record furnishes no support for that theory. No evidence was introduced by appellant having any tendency to overthrow the determination that the land was of the requisite character—that it was land classified as non-mineral as required by the act—which is embodied in the patent itself. On the contrary, the evidence affirmatively shows that the land was in fact classified as non-mineral at the time of survey. This appears from the decision of the Secretary of the Interior, dealing with the claims of appellant and others, on appeal, which is in evidence here. (Tr. 67; 37 L. D. 135.) The recital in the decision of the Commissioner of the General Land Office, to which appellant refers (Tr. 65), if otherwise of any force, is overcome by this decision of the Secretary. We have pointed out that the record of the proceedings in the Department introduced by appellant is fragmentary and incomplete, and aside from the effect which must be given the finding of the Secretary, the incompleteness of the evidence as to those proceedings brings into play the rule referred to in the last preceding paragraph.

The trial court held specifically (Tr. 76, 79) that the record was incomplete and the evidence insufficient to support the inference upon which appellant's theory concerning classification of the land was based. And in the argument before the Court of Appeals, appellant's counsel (having already, in his brief, abandoned the point and the assignment of error based thereon) expressly conceded this ruling to be correct. And we submit that an examination of the record will demonstrate that the trial court was right and the concession of counsel well advised.

8. But if appellant's present contention as to the nature of the surveyor's return were supported by the record, and if the point were open on this appeal, nevertheless it must still be held that the return amounted to an affirmative non-mineral classification within the meaning of the act of 1899. This question is so well covered by the thoughtful and scholarly opinion of the learned trial judge (Tr. 78-80) and by the reasoning of the authorities cited below that further argument seems unnecessary.

Davenport v. Northern Pacific Railway Company, 32 L. D. 28.

Bedal v. St. Paul, Minneapolis & Manitoba Railway Company 29 L. D. 254.

St. Paul, Minneapolis & Manitoba Railway Company, 34 L. D. 211.

Daniels v. Northern Pacific Railway Company, 43 L. D. 381.

Miles v. Northern Pacific Railway Company. (Unpublished, see Appendix to this brief.)

The rule already adverted to that a contemporaneous and long continued construction by the Department should be given controlling weight, applies with peculiar force in this connection, where the construction deals with the effect to be given to returns of surveyors made under departmental practice and regulations.

9. In conclusion, it may be pointed out that there is another all-sufficient reason why the question whether this land was or was not classified as to its mineral or non-mineral character, either by the Commissioners appointed under the act of 1895 or "at the time of the government survey thereof", is not before the court in this case; and that is that no such question is in issue under the pleadings. (Tr. 1-25.) And the same thing is true of the so-called "successorship" point.

III.

Appellant's main reliance here (as it was his sole reliance in the court below, and his main reliance in the trial court) is upon the proposition that as the lands were unsurveyed when selected by the Railway Company June 21, 1901, the description of them, according to the section, township and range by which they would be known when surveyed, was not such a description as the act required.

Some account of the departmental regulations governing selections of unsurveyed lands is necesasry to a clear understanding of the question thus raised. The Mt.

Ranier act is not the only one authorizing such selections. They are authorized as well by the act of June 4, 1897, (30 Stat. 11, 36) dealing with forest reservations, and by the act of July 1, 1898, (30 Stat. 597, 620) dealing with the Northern Pacific grant; so that before the enactment of the Mt. Ranier act, the department was met with the necessity of determining how unsurveyed lands selected under those acts should be described and identified.

Accordingly, it promulgated rules governing such selections. The act of July 1, 1898, provided in terms that "all selections of unsurveyed lands *shall be of odd-numbered sections to be identified by the survey when made.*" The departmental regulations governing selections under this act are dated February 14, 1899, and are to be found in 28 L. D. 103,108. They provide:

> "Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein, 'to be identified by the survey when made;' *that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.* Selections of unsurveyed lands by an individual claimant must be designated *according to the description by which they will be known when surveyed*, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended."

The act of June 4, 1897, is not so explicit as to how unsurveyed lands when selected shall be identified. Indeed it was not until April 14, 1899, when the Department decided on review the first case of *F. A. Hyde*, 28 L. D. 284, that unsurveyed lands were determined to be selectable

under that act. This having been determined in that case, however, the Department promulgated regulations May 9, 1899, (28 L. D. 521) which provided:

> "Every selection of unsurveyed land *must designate the same according to the description by which it will be known when surveyed, if that be practicable*, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being identified when the lines of public survey come to be extended."

Though the Mt. Ranier Act was passed March 2, 1899, it was not until July, 1899, after its relinquishment of its granted lands within Mt. Ranier Park, that the Railway Company was in a position to make selections under it; and at that time, as we have seen, all of the departmental regulations relating to the selection of unsurveyed lands required that such lands, when selected, should be described and identified according to the description by which they would be known when surveyed. Though framed with specific reference to the Acts of June 4, 1897, and July 1, 1898, they were by their terms generally applicable to any selection of unsurveyed lands, and it was not thought necessary, on the passage of the Act of March 2, 1899, to issue additional regulations. Those already in effect were taken as covering *any* selection of unsurveyed lands.

Hanson v. Northern Pacific Railway Co., 38 L. D. 491.

Daniels v. Northern Pacific Railway Co., 43 L. D. 381.

Delaney v. Northern Pacific Railway Company, 45 L. D. 6.

Miles v. Northern Pacific Railway Company. (Unpublished; see copy in Appendix to this brief.)

Compliance with those regulations was accepted by the Department as a full compliance with the requirements of the law until February 21, 1908. On that date the Department issued a circular (36 L. D., 278), which was by its terms applicable to all forms of "scrips, warrants, certificates, soldiers' additional homestead rights and lieu selections" of whatever kind; and which provided for the posting on the land of notice of the selection, application, or entry. This regulation, of course, was intended to apply to selections under the Mt. Ranier Act, as well as to selections under the acts of 1897 and 1898. But it was not intended to have—and indeed it could not have been given—a retroactive operation. This is manifest from the language of the circular itself, which although issued February 21, 1908, provided that "the following requirements will govern *on and after April* 1, 1908." Indeed, in the very decision upon which appellant places his main reliance—the case of *F. A. Hyde, et. al.*, 40 L. D. 284—it is expressly held that the circular of February 21, 1908, has no retroactive effect.

November 3, 1909, a circular was issued (38 L. D. 287) carrying a new regulation applicable to all cases of selections, filings, and locations upon unsurveyed lands, in which, for the first time, it is required that such selections, etc., must describe the land "by metes and bounds, with courses, distances and reference to monuments," etc., and that the boundaries of the selected land shall be marked out upon the ground. This regulation further provides that "the approximate description of the land by section, township and range, as it will appear when surveyed, must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor." But it was

specifically held in *Hanson v. Northern Pacific*, 38 L. D. 491, that this regulation could not be given retroactive effect.

With this summary of the departmental regulations in mind the court will observe that when, in June, 1901, the railway company selected the lands in question the kind of description which it should make of them was not a matter of choice. *It was controlled by the regulations of February* 14, 1899, *and May* 9, 1899. Wherever it was possible to describe land according to the description by which it would be known when surveyed the railway company was not merely authorized but *required* to do so. It is obvious, therefore, that to sustain appellant's contention this court must hold *as matter of law* that that description has not a "reasonable degree of certainty," which was not merely accepted by the Department as being reasonably certain in *fact*, but was *prescribed* by the Department, *sua sponte*, as answering most nearly to the law's requirements.

The courts below declined unanimously to hold this, and clearly they were right in doing so. The question whether a given description identifies lands with "a reasonable degree of certainty" is essentially one of fact. It is a question which, from the very necessities of the case, must, in the first instance, be decided by the Land Department. Considering the nature and character of its duties, the Department may be supposed to know, better perhaps than any one else, whether a given description is reasonably certain; and there is a special propriety in committing the question to it for determination. It is doubtless true that the discretion thus vested in that Department may not be arbitrarily exercised. The De-

partment may not say that that is a reasonably certain designation which cannot be taken to designate anything at all. But within reasonable limits, it is plain that the decision by one administrative department whether a given description is reasonably certain is as much a decision of a question of fact as is the decision by another administrative department whether a given rate or practice is reasonable and whether such questions are decided by the Land Department or by the Interstate Commerce Commission, the decision in the absence of fraud or arbitrary action is not reviewable by the courts. *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452; *Interstate Commerce Commission v. D. L. & W. R. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission v. U. P. R. R. Co.*, 222 U. S. 541.

As said by this court in *Burfenning v. Chicago, Etc., Ry. Co.*, 163 U. S. 321-323:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to re-litigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332."

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the Court, speaking of the function of the Secretary with respect to the issuance of patents for indemnity land, said:

> "His action in that matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the lands granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed."

The case of *Groeck v. Southern Pacific R. Co.*, (C. C. A. 9th Cir.) 102 Fed. 32, 34, is directly in point. That was a suit by the Southern Pacific Railroad Company to declare Groeck trustee of a patent title granted to him under a pre-emption entry, the Railroad Company claiming under the land grant act of July 27, 1866. The land had been selected by the Railroad Company as indemnity, and its selection had been rejected because in conflict with the pre-emption claim of Groeck. The court said:

> "Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the secretary of the interior whenever the grantee thereof complies with the directions which the secretary has published for the regulation of such selection. The secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the secretary in this instance made any regulation which has injuriously affected the right of the grantee. *He had the power to prescribe in advance the method of making such*

selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act."

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action. The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specifically required.

Nor is it difficult for anyone, acquainted as this court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may of course be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie, and as said by the trial court (Tr. 82), it might well be held that as to lands so situated such a designation would not be reasonably certain. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many

years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be known when surveyed. The grants to the railroad companies included all odd-numbered sections, *whether surveyed or unsurveyed*, which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

To say that when the adjacent township lines have been run, it is impossible or even difficult to determine with reasonable certainty where a given section will lie, is to fly in the face of facts with which most residents of the Western states are familiar. As already stated, when, on June 21, 1901, the railway company filed the selection list in question, the southern line of township 45 North, range 3 East had been run. Suppose that, instead of selecting a tract of land "which, when surveyed, will be described as section 20, township 44 North, range 3 East," the railway company's description of the tract thus selected had been as follows: "Commencing at a point distant three miles due south from a point on the south line of township 45 north, range 3 east, one mile east of the southwest corner of said township; thence due east one mile; thence due south one mile; thence due west one mile; thence due north one mile to the point of commencement." Here we have a "metes and bounds" description, and as such it would satisfy appellant's objection. Yet can anyone doubt that the description actually used by the railway company

means the same thing? Or can it be doubted that anyone interested in the lands would gather that meaning from it? And is it not apparent that in marking the boundaries of the land involved in this suit, the party from whom appellant purchased had himself defined or marked them by exactly that kind of anticipatory identification of them with the official survey which appellant now says was impossible? It appears that the adjoining township (45 north, range 3 east) had been officially surveyed and the corners established; and of course the south line of that township necessarily constituted and was coexistent with the north line of township 44, range 3, in which the land involved in this case is situated. The land in suit is three and one-half miles from this township line. The testimony of the witness who helped mark the lines of appellant's claim is that the south line of the adjoining township having been established, they "carried their lines in from the south line of that township," and "undertook to tie them up to the government lines." (Tr. 34.) It was lines so run that the appellant found blazed upon the land when he went into possession in 1903. (Tr. 28.) Doubtless these blazed lines were not exactly coincident with the official survey lines as finally determined; and it is possible (though less likely), that such a metes and bounds description as we have supposed above would not coincide exactly with the lines of section 20. The corrected list in the one case and the application to make homestead entry in the other would definitely determine the land claimed. But it is clear that the language by which the Railway Company "designated" the land selected was the perfectly definite and intelligible equivalent of the best metes and bounds description that could have been

devised; and it is surely no objection to it that it describes or indicates lines which *must* coincide with the lines of the official survey, instead of lines which might not do so.

What is a "reasonable degree of certainty" within the meaning of the statute? Can it be said that the form of description which the Department for ten years held to be proper and sufficient—which it even made obligatory and exclusive—is so indefinite and uncertain that it does not come within the term.

In *Balderston v. Brady*, 107 Pac. 493, 498, the Supreme Court of Idaho said:

> "The fact, however, that the land was not surveyed could make no difference *where the numbers of the sections were specifically given.* The title to unsurveyed lands may be as readily conveyed as that to surveyed lands. It is a maxim of law that that is certain which is capable of being made certain. 'Id certum est, quod certum reddi potest.' All that remained to be done in order to identify these lands on the ground was to have the survey extended over them. The description in the grant was definite and certain."

The act of 1899 requires only a "reasonable degree" of certainty. The words are not meaningless. Fairly construed, they indicate an intent to allow considerable latitude in the matter of description. Else why say "*reasonable degree*"? The form of description which appellants argue for in these cases calls for *absolute* certainty. But the words of the act are more elastic in their meaning and purpose.

It must be apparent that the requirement of the statute may be satisfied in several different ways. It might be

satisfied, for instance, by a description based upon natural landmarks, water boundaries or artificial monuments, or a combination of these or by a description tied in, by courses and distances, to the established corners of some completed survey. But this is not to say that a description by reference to the survey thereafter to be made does not conform to the definition of a "reasonable degree of certainty."

It should be borne in mind that the question now to be determined is not whether the practice heretofore pursued is the best and wisest that could be devised, but whether it can possibly be held to be permitted by the terms of the act. If under any fair or reasonable interpretation of the statute the form of description sanctioned by the Department can be held to come within the statute, then the selections must be upheld. In short, the present question, viewed in the aspect most favorable to appellant, is merely whether the construction which the Department has put upon the act is *possible or permissible* under the language employed by Congress. For when the Department has interpreted the law, and rights have been acquired on the faith of that interpretation, a reconsideration of the question is somewhat limited in its scope; and it is not enough that the later view may favor a practice different from that formerly established, if the former practice is within any reasonable interpretation of the words of Congress.

The question before the court in this case is not one which has to do with substantive rights granted by the law, but only with the course of *procedure* to be followed in

perfecting rights so granted. The Department construed the statute to require and permit certain steps to be taken. Those steps were taken in good faith by the Railway Company, the party claiming under the act, in exact accordance with the rules laid down by the Department, and in reliance upon the Departmental construction. No one has been misled or prejudiced. Under these circumstances we submit that it is not the duty of the court to resort to refinement of reasoning for the purpose of overthrowing that construction. After all, the question at this late date is not what interpretation the Department ought to put upon the provisions of the act of 1899, if the question were now before it for the first time. The question is whether the construction which the Department did put upon the act in the very beginning, which it steadfastly adhered to in administrative procedure for more than ten years, and which it still consistently adheres to as a matter of construction, is so obviously unreasonable and so contrary to the terms and intent of the statute as to afford no protection to parties proceeding in reliance upon it. Unless the statute is so clear as to leave no doubt as to its meaning, and the interpretation thus placed upon it by the Department is plainly and palpably unreasonable, then that interpretation should not now be departed from to the prejudice of rights acquired upon the faith of it.

We proceed now to notice certain points in appellant's brief.

1. In the court below appellant relied chiefly on the reasoning of Assistant Secretary Adams' opinion in the case of *F. A. Hyde, et al*, 40 L. D. 284. But in their brief to this court, his counsel transfer their allegiance from the decision in the *Hyde* case to a more or less informal unpublished letter from Assistant Secretary Adams to the Commissioner, said to have been written shortly after the *Hyde* case was decided, in which Mr. Adams explains and defends the theory advanced by him in that case. This letter is not in evidence, nor is it reported. And granting that it is all counsel says, we understand that under the departmental practice a communication of this sort is without authoritative force. However, we may concede all appellant claims for the opinion in the *Hyde* case and Assistant Secretary Adams' comment thereon in his subsequent letter to the Commissioner. For in *Daniels v. Northern Pacific*, 43 L. D. 381, the *Hyde* case was expressly overruled and the decision of Judge Dietrich in the present case approved and followed, and it was held unequivocally that a designation of unsurveyed land according to the description by which it will be known when surveyed does identify the land described with a reasonable degree of certainty and is a full compliance with the requirements of the Act of March 2, 1899. And this repudiation of the doctrine of the *Hyde* case carries a like repudiation of the theories of Mr. Adams' letter, in which appellant puts such extraordinary reliance. Moreover, as pointed out in the *Daniels* case, even in the *Hyde* case "it

was unequivocally held that such a description was valid as against the Government."

The opinion in the *Daniels* case shows that the decision is based upon the most painstaking and thorough research and consideration. It has since been adhered to and followed, after repeated reargument of the question, in a large number of decisions; mostly unreported, but including *Delaney v. Northern Pacific Railway Co.*, 45 L. D. 6, and *Miles v. Northern Pacific Railway Co.* (See appendix.) And the *Daniels* case is in line with previous decisions of the Department and with the general course of departmental rulings; while the *Hyde* case is wholly without support in any departmental decision or ruling—save as it may be said to find support in the somewhat informal letter upon which appellant lays so much stress.

2. As already stated, the act of July 1, 1898, (30 Stat. 597, 620) contains a direct recognition by Congress of the sufficiency of a description in terms of future survey; for that act provides specifically for that kind of a description where unsurveyed lands are selected under it. In the courts below, counsel for appellant did not deny this. On the contrary, they not only admitted it, but proceeded to draw from it an argument in their favor. In their brief filed in the Circuit Court of Appeals, after quoting the language of the act of July 1, 1898, they go on to contrast that language with the language of the act of March 2, 1899, and they say:

> "If Congress had intended *to continue* to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted."

This argument the Circuit Court of Appeals takes up and answers specifically. (Tr. 112.)

As to this point, also, counsel for appellant take, in this court, an entirely new stand. They devote to the discussion of the Act of July 1, 1898, an entire division of their brief (pp. 64-68), and they treat it as an act of which "*the only force and effect*" was to provide that the Railway Company's selections should be restricted to odd-numbered sections (Brief p. 65); they say that "the absurdity of the position of the Department" in ascribing to the act any further or different effect "must be apparent to everyone"; all of this in flat contradiction to their position in the court below. This is perhaps of no special importance, because, of course, the real question is as to the meaning of the act of July 1, 1898, and not whether counsel for appellant have been consistent in their account of its meaning. But we cannot forbear suggesting that it requires in counsel for appellant a considerable degree of cheerful assurance to criticise the Department of the Interior and describe its position as one of "absurdity" for no other reason than that it has ascribed to the act of July 1, 1898, that meaning which they themselves have hitherto not merely admitted, but argued that it bore.

Turning then to the language of the act itself, it is apparent at once that counsel were right as to its meaning in the court below and that they are wrong here. The act means exactly what the Department from the outset has said it means; and we believe the correctness of the departmental construction was never questioned before. It authorizes the company to select unsurveyed lands and it provides that only odd-numbered sections "to be identified by survey when made" shall be selected. How is it pos-

sible to make any selection of unsurveyed lands under these limitations except in terms of future survey? On their own showing counsel read out of the act the words "to be identified by the survey when made." They say expressly (Brief p. 65) that it would not "have changed the meaning in the slightest" if those words had been left out. Why, then, did Congress put them in?

3. Counsel cite and quote extensively from the case of *Bird Timber Company v. Snohomish County*, 81 Wash. 416; 143 Pac. 433, in which the Supreme Court of Washington, relying upon the decision of the Department in the *F. A. Hyde case, supra*, held a description in terms of future survey to be insufficient. They appear to have overlooked the fact that upon rehearing of that case the court *expressly withdrew* all it had said upon that question. *Bird Timber Company v. Snohomish County*, 88 Wash. 90; 152 Pac. 689.

4. At page 42 of their brief, counsel cite the case of *Central Pacific Railroad Company v. Nevada*, 162 U. S. 512, and they quote certain language which they describe as language used by "Mr. Justice Brown, speaking for the court." The language quoted is the language not of Mr. Justice Brown, but of the Supreme Court of Nevada and was used by that court in support of its holding that taxes might not lawfully be levied upon the unsurveyed odd-numbered sections within the forty-mile limits of the grant to the Central Pacific Railroad Company. Whether any other lands in the immediate vicinity had or had not been surveyed was not made to appear; and obviously the case falls far short of holding that a description in terms of future survey can never, in any situation, designate lands

5. Counsel argue that because the Act provides for the filng of a second list after survey in case the description in the first list does not precisely conform to the lines of the official survey, it is therefore apparent that description in the original list in terms of future survey was not contemplated. This argument is answered so completely below that we cannot do better than quote what is said by the trial court (Tr. 83):

> "By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, 'In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.' It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustments. *The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted.* The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the land shall be designated with 'reasonable degree of certainty;' the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

6. The assignments of error do not raise the objection, somewhat pressed at the trial, that the boundaries of the selected tract were not marked on the ground by monuments, blazes and notices; nor is that point touched in appellant's brief. Therefore we forbear to discuss the question.

IV.

But suppose we concede that the view, in which the Department, the District Court and the Court of Appeals have concurred, that a description in terms of future survey is sufficient to designate the land with a reasonable degree of certainty within the meaning of the act of 1899, is erroneous. This brings into play the well settled rule of law that where a party has proceeded, in the acquisition of rights under the public land laws, in the manner prescribed by the Department with respect to matters of *practice and procedure*, his rights are not to be defeated upon the ground that the practice thus established was rooted in an incorrect construction of the law or in unsound views of administrative policy. It has been shown that the selection attacked in this case was made in exact compliance with the practice established by the Department shortly after the passage of the act of 1899, and steadfastly maintained and upheld by it without change for many years thereafter; and rights founded thereon cannot now be destroyed because it is conceived that the practice was wrong, even though this court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle upon which this proposition rests has been establishd by numerous decisions of the Department and the courts; and is one of fundamental equity and justice. It recognizes that where the question is one of substantive law—where it is a question whether the land is subject to the particular form of appropriation, or whether the claimant is of the class entitled to take such land—the departmental construction of the statute is not necessarily

binding upon the courts. But where the question is one of *practice and procedure* merely, and where the claimant has, in compliance with the rulings of the Department, taken the particular steps required by departmental regulations, in the manner prescribed by the Department under its construction of the act, he is not to be deprived of his rights upon the ground that such construction was ill-advised and that a different mode of procedure should have been prescribed. This principle rests upon the just and wise basis that a claimant, on whom the statute has conferred the right to acquire title to particular land, ought not to be penalized for his obedience to the rules laid down by the officers to whom the administration of the law is confided.

In *Germania Iron Co. v. James*, (C. C. A. 8th Circuit), 89 Fed. 811, Judge Sanborn said:

> "The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act. * * * Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence, of all rights and title to this land. Rights initiated in accordance with them became vested interests in property, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, '*Stare decisis, et non quieta movere*,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property is acquired or secured. *It is often far more important that these should be certain and changeless than that they should be right.* Men engage in business occupations, buy, sell, and contract, in reliance upon them. Lawyers advise their clients

and enforce and protect their rights with constant reference to them, and while all interests will readily adjust themselves to, and protect themselves under, erroneous rules, there is neither protection nor safety for any interest under shifting rules. * * * *Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous.* They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * *had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws.* * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts."

On a second appeal in the same case (*James v. Germania Iron Co.*, 107 Fed. 597) the same learned judge said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * *

> Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

In *Howe v. Parker,* (C. C. A. 8th Circuit), 190 Fed. 738, 757, Judge Sanborn again said:

> "The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order, and the uniform application of the established rules and practice of the Department to all litigants alike are as essential to the administration of justice in the Land Department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers."

The great leading case on the subject is *United States v. MacDaniel,* 7 Pet. 1, 14. And we may say in passing that we have found no case in which the principle of the *MacDaniel* case has been questioned or its authority doubted. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. This court held the new ruling valid and effective as applied

to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection it was said:

> "A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, *usages have been established in every department of the Government, which have become a kind of common law*, and regulate the rights and duties of those who act within their respective limits. *And no change of such usages can have a retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the construction given to it, *and must be considered binding on past transactions.*"

Rand v. United States, 38 Fed., 665, is a case which applied the doctrine of *United States v. MacDaniel* to the question whether certain officers of the Treasury Department were entitled to fees for certain services. There was no statutory authorization for such charges, but the previous usage of the Department permitted them.

A somewhat similar application of the rule was made in *Walker v. United States*, 139 Fed., 409, 416, where the language we have excerpted from the *MacDaniel* case was approved and applied.

United States v. Alabama, etc., Railroad Co., 142 U. S., 615, 621, is another well-known authority, in which the *MacDaniel* case is cited and approved. In that case Mr. Justice Brown said:

> "We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department * * * should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. *It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive.*"

In *United States v. Newport News, etc., Co.*, 178 Fed., 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the *MacDaniel* case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the *MacDaniel* case the language excerpted on a preceeding page, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the terms of the contract itself, would be equivalent to a retroactive change in established usage which could not be made to the prejudice of rights already

initiated, under the principle established by the *MacDaniel* case.

And as lately as *Haas v. Henkel*, 216 U. S., 462, 480, and *United States v. Birdsall*, 233 U. S. 223, 231, this court has quoted with approval the language of *United States v. MacDaniel* to which such frequent reference has already been made.

In *State v. Kelsey*, 44 N. J. L., 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in *Rogers v. Godwin*, 2 Mass., 477:

> "And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In *Stuart v. Laird*, 1 Cranch, 299, this Court said:

> "To this objection, which is of recent date, it is sufficient to observe that *practice and acquiescence* under it for a period of several years * * * affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In *Commonwealth v. Gregory*, 89 S. W. Rep., 168, the Court of Appeals of Kentucky quoted with approval the language of an earlier Kentucky case (*Harrison v. Commonwealth*, 83 Ky., 162), where it was said:

> "The executive branch of a government must necessarily give a construction to the laws which it must execute; and, if its construction has been followed for years, and in view of and without interefrence by the law-making power, then such contemporaneous and long-continued construction should not be departed from without the most cogent reasons. *A long-continued practice* under a statute, under such circumstances, ripens into an authoritative construction of it."

In *United States v. Hammers*, 221 U. S., 220, which involved the question of the assignability of desert land entries, this Court said:

> "We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice* of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

Turning now to the decisions of the Department, we find numerous cases in which the precise question was directly considered. The leading case appears to be *Mary R. Leonard*, 9 L. D., 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previ-

ous practice, even though erroneous, and Secretary Noble said:

> "Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of *Miner v. Mariott*, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretaton.' * * * In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal.'"

Miner v. Mariott, 2 L. D., 709, cited in the *Leonard* case, is another leading authority. In that case it was held that a previous practice of the Department (not based upon specific regulations, but upon custom and rulings) with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

> "The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your

> office. *Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.*"

In *Henry W. Fuss*, 5 L. D., 167, cited in the *Leonard* case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary (afterwards Mr. Justice) Lamar said:

> "Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed. *the regulation of your office which recognized the right of assignment had, until revoked, or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected.*"

In *Cudney v. Flannery*, 1 L. D., 165, Secretary Teller said:

> "The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated * * * even though such an entry might not now be allowed. The latter rulings cannot have this retroactive effect.*"

In *David B. Dole*, 3 L. D., 214, Secretary Teller said:

> "I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

> "But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date of June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal."

In *C. P. Masterson*, on review, 7 L. D. 577, it was said:

> "I am unable to find that the Land Department has in any case directly announced the principle that coal-land entries may be made of non-contiguous subdivisions; but it seems to be a fact that such was the practice of your office, and that in many instances entries consisting of non-contiguous subdivisions have been allowed to pass to patent. It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation, are necessarily illegal."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213.

Isham Floyd, 5 L. D., 531.

James Spencer, 6 L. D., 217.

Candido v. Fargo, 7 L. D., 75.

C. P. Masterson, on review, 7 L. D., 577.

William Thompson, 8 L. D., 104.

John M. Lindback, 9 L. D., 284.

J. H. Kopperud, 10 L. D., 93.

Jacob Oswald, 11 L. D., 155.

Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391.

Oro Placer Claim, 11 L. D., 457.
Edwin F. Frost, 21 L. D., 38.
Tustin v. Adams, 22 L. D., 266, 270.
Ella I. Dickey, 22 L. D., 351.
State of California, 22 L. D., 428.
Kirk v. Brooks, 24 L. D., 448.
Labathe v. Robords, 25 L. D., 207.
Rough Rider and Other Lode Claims, 42 L. D., 584.

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or procedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or by departmental ruling or decision, and cases of a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character, as will appear from the language we have quoted. This is especially true of some of the most important of them; notably *United States v. MacDaniel*, 7 Pet. 1, which is the leading case in the courts.

In *Haas v. Henkel*, 166 Fed. 621, 627, it was said:

> "Such regulations, as held in *United States v. MacDaniel*, 7 Pet. 14, need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department."

And in the very recent case of *United States v. Birdsall*, 233 U. S. 223, 231, Mr. Justice Hughes said:

"Nor was it necessary that the requirements should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. *United States v. MacDaniel*, 7 Pet. 1, 14."

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local

land office and was unaware that any selection list had been filed; so, as the learned District Judge points out, he "had no knowledge of the existence of the list, and therefore, whatever may have been the form of description, it could not have influenced his action." (Tr. 86.)

Much is said in appellant's brief of the duty of the courts to apply the strictest possible construction to the act of 1899, as against the Railway Company and its grantee. But in the first place the act of 1899 is not a *grant* as counsel seems to understand that term. It is thus described by the Department and the courts, in language a part of which is quoted elsewhere in this brief:

> "The act is contractual in character and terms, and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899."

But even if the act of 1899 were subject to the same rules of construction as the original Northern Pacific grant, it does not follow that an especially strict construction should be applied. The rule in such cases is well stated in *Burke v. Southern Pacific Railroad Company*, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the Northern Pacific grant of 1864:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both*. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described*. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift*."

CHARLES W. BUNN,
CHARLES DONNELLY,
JAMES B. KERR,
STILES W. BURR,
Counsel for Appellees

APPENDIX.

DEPARTMENT OF THE INTERIOR.

Washington, February 16, 1915.

D-578.
D-15944.

KIP CALKINS MILES ET AL.,

vs.

NORTHERN PACIFIC RAILWAY CO.

(Marble Creek, Idaho, Cases.)

APPLICATION FOR HEARING, ORAL ARGUMENT, AND REQUEST FOR OPINION OF ATTORNEY GENERAL.

In the above entitled cases involving contests brought by certain settlers on public lands in the Marble Creek, Idaho, region, against the Northern Pacific Railway Company's selection of the same lands under authority of the act of March 2, 1899, (30 Stat., 993), counsel for the settlers have requested a rehearing (including oral argument) and, in the event that "the Department cannot see its way to grant our motion * * * and recall and vacate its former decision, that the Attorney General be requested to give his opinion." Two printed briefs are

filed on behalf of the settlers, in which briefs the case of said settlers is presented very thoroughly and forcibly.

The Department's decision in the leading case (that of *Frank O. Daniels v. Northern Pacific Railway Company*, 43 L. D. 381) was based upon an affirmative finding upon the following issues, which issues are believed to be determinative of the cases of all the Marble Creek settlers:

> Was the land classified as non-mineral at the time of the actual survey so as to bring it within the terms of the act of March 2, 1899 (30 Stats. 993).
>
> If so classified, was the description by technical legal subdivisions which the tracts would bear "when surveyed" a description of "reasonable certainty", as required by the act. * * *
>
> Was the notice of the selection given?

Counsel for the Marble Creek settlers, in their second brief above mentioned, ask that—

> whatever view the department may take of the law governing these selections and the rights of our clients that the facts as to the mineral classification of the lands, the lack of proximity of established Government surveyes to Township 44 N., Rgs. 2 and 3 East, as well as the other facts fully shown in the hearing in the Miles case be set out in any decision which may be made concerning these claims.

Regarding the "mineral classification of the lands," the Department, upon full consideration of the question, adheres to the conclusion reached in the Daniels case, that, under the long-followed practice of the land department, "land not returned as mineral" when official surveys are made "is held to be as effectually classified as agricultural land as if so returned in the field notes." It may be that the land settled upon by Mrs. Miles and some of the other settlers had been classified as mineral by the special Gov-

ernment commission appointed under the terms of the act of February 26, 1895 (28 Stat., 683), but what shall constitute "non-mineral public lands" for the purpose of the act of March 2, 1899 (30 Stat., 993) upon which the Northern Pacific Railway Company's case rests, is set forth in the act itself as follows: "so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States." In the case of *State of Idaho et al., v. Northern Pacific Railway Co.,* (37 L. D., 135), the Department held that the fact that lands were classified as mineral under the act of February 26, 1895, *supra,* would not prevent selection thereof by the Northern Pacific Railway Company under the act of March 2, 1899, *supra,* if otherwise within the terms of that Act. As matter of fact, the lands involved have been ascertained to be non-mineral, and, were the contrary the case, the settlers would be precluded from making agricultural entry thereof.

Regarding "the lack of proximity of established Government surveys" to the lands here involved, it may be stated that, whilst not an issue in this case or the Daniels case, the decision in the latter case did discuss the question whether Daniels might not, from existing corners of the Government surveys, have ascertained, without much difficulty, the locus of the land he settled upon in its relation to the public surveys. If, as appears from the record, the land was subject to selection by the railway company, and, prior to the settlers going thereon, the company filed its selection list in the local office—the only notice required by the act of 1899—any difficulty the settlers might be under in determining the location of the land, due to the lack of Government surveys, could not give them

rights paramount to those of the railway company. Furthermore, it is shown by the records and admitted in the brief and argument upon the pending motion, that at the dates of the alleged settlements under consideration, the north and west boundaries of T. 44 N., R. 2 E., and the north boundary of T. 44 N., R. 3 E., had been established; and the Department adheres to its decision that, under such circumstances, the locus of any tract within those townships could then have been ascertained, to a reasonable certainty, by the exercise of ordinary diligence and intelligence.

The decision of the Department has been carefully reexamined in the light of the arguments advanced by counsel in the briefs filed, but nothing is found calling for a different conclusion from that previously reached in the case. The motion for rehearing, request for oral argument, and conditional request for reference of the case to the Attorney General, are therefore denied.

(Signed) A. A. JONES,
First Assistant Secretary.